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United States Patent and Trademark Office
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Alexandria, VA 22313-1450
www.uspto.gov

STEN R. GERFAST
1802 VALLEY CURVE ROAD
MENDOTA HEIGHTS, MN 55118

MAILED

FEB 27 2009

OFFICE OF PETITIONS

In re Application of :
Gerfast :
Application No. 10/733,944 : DECISION
Filed: 12 December, 2003 :
Attorney Docket No. (None) :

This is a decision on the petition, filed on 28 November, 2008, supplemented on 24 February, 2009, to revive under 37 C.F.R. §1.137(b) and alleging abandonment due to unintentional delay.

The petition under 37 C.F.R. §1.137(b) is **DISMISSED**.

Any request for reconsideration of this decision must be submitted within TWO (2) MONTHS from the mail date of this decision. Extensions of time under 37 CFR §1.136(a) are permitted. The reconsideration request should include a cover letter entitled "Renewed Petition under 37 CFR §1.137(b)."

This is **not** a final agency action within the meaning of 5 U.S.C. §704.

As to the Allegations
of Unintentional Delay

The requirements of a grantable petition pursuant to 37 C.F.R. §1.137(b) are the petition and fee therefor, a reply, a proper statement of unintentional delay under the regulation, and, where applicable, a terminal disclaimer and fee. (However, it does not appear that a terminal disclaimer and fee are due here.)

*Petitioner continues to ignore the directions in the Notice of 28 March, 2006, a copy of which again is enclosed, as to the proper marking of amended drawings and amendments to the specification and claims. These deficiencies **must** be overcome.*

BACKGROUND

The record reflects that:

Applicant, failed to reply timely and properly to the non-final Office action mailed on 20 May, 2005, with reply due absent an extension of time on or before 20 August, 2007.

Thereafter:

Petitioner's 6 June, 2005, amendment was followed by the 28 March, 2006, Notice of Non-Compliant Amendment. (All documents discussed herein previously were provided.) Petitioner's 2 April, 2006, amendment was followed by the 16 June, 2006, Notice of Non-Compliant Amendment. Petitioner's 23 June, 2006, amendment was followed by the 12 June, 2007, Communication. Petitioner's 27 June, 2007, amendment was followed by the 27 June, 2007, Notification of Fee Due.

(Petitioner was cautioned to consult the Office website (www.uspto.gov) to ascertain the amount of fees due under the current Fee Schedule and ensure that passage of time between Notice and reply does not trigger a requirement for additional extensions if available.)

The Office mailed the Notice of Abandonment on 25 February, 2008;

On 3 March, 2008, Petitioner filed a petition under to 37 C.F.R. §1.181 with, *inter alia*, an averment that replies had been timely and properly filed to non-final Office action, and reasserting an earlier complaint that the "delay was at the PTO"—and ignoring that the extension of time requirement was to make timely Petitioner's reply under the then-current Fee Schedule. The petition was dismissed on 24 March, 2008, *inter alia*, for failing to make the required showing.

On 7 April, 2008, Petitioner filed a second petition—under 37 C.F.R. §1.137(b) averring unintentional delay, and the petition was dismissed on 19 June, 2008, for failure to pay the proper fee because Petitioner erroneously paid the fee for a petition averring unavoidable delay.

On 27 June, 2008, Petitioner filed a petition and set forth on the face of the petition that a fee of \$700.00 was being paid, however, upon review Office records did not reveal receipt of any payment by Petitioner with the petition, and as of that time the fee for the petition was \$810.00. (Petitioner again was cautioned to consult the Office website (www.uspto.gov) to ascertain the amount of fees due under the current Fee Schedule and ensure that passage of time between Notice and reply does not trigger a requirement for additional extensions if available). Thus Petitioner's showing did not conform to the showing requirements under the rule and the petition was dismissed on 24 November, 23008.

On 28 November, Petitioner filed a petition under 37 C.F.R. §1.137(b) averring unintentional delay, with fee, the reply in the form of an amendment and thereafter supplemented with the drawings on 24 February, 2009, and made the statement of unintentional delay. *However, what is clear from the 24 February, 2009, submission, as with those before it, Petitioner continued to ignore the directions in the Notice of 28 March, 2006, a copy of which again is enclosed, as to the proper marking of amended drawings and amendments to the specification and claims. These deficiencies must be overcome in order for the petition to be granted.*

The availability of applications and application papers online to applicants/practitioners who diligently associate their Customer Number with the respective application(s) now provides an applicant/practitioner on-demand information as to events/transactions in an application.

Out of an abundance of caution, Petitioners always are reminded that those registered to practice and all others who make representations before the Office are reminded to inquire into the underlying facts of representations made to the Office and support averments with the appropriate documentation—since all owe to the Office the continuing duty to disclose.¹

STATUTES, REGULATIONS AND ANALYSIS

Congress has authorized the Commissioner to "revive an application if the delay is shown to the satisfaction of the Commissioner to have been "unavoidable." 35 U.S.C. §133 (1994).²

The regulations at 37 C.F.R. §1.137(a) and (b) set forth the requirements for a Petitioner to revive a previously unavoidably or unintentionally, respectively, abandoned application under this congressional grant of authority.

Unintentional delays are those that do not satisfy the very strict statutory and regulatory requirements of unavoidable delay, and also, by definition, are not intentional.³))

¹ See supplement of 17 June, 1999. The Patent and Trademark Office is relying on petitioner's duty of candor and good faith and accepting a statement made by Petitioner. See Changes to Patent Practice and Procedure, 62 Fed. Reg. at 53160 and 53178, 1203 Off. Gaz. Pat. Office at 88 and 103 (responses to comments 64 and 109)(applicant obligated under 37 C.F.R. §10.18 to inquire into the underlying facts and circumstances when providing statements to the Patent and Trademark Office).

² 35 U.S.C. §133 provides:

35 U.S.C. §133 Time for prosecuting application.

Upon failure of the applicant to prosecute the application within six months after any action therein, of which notice has been given or mailed to the applicant, or within such shorter time, not less than thirty days, as fixed by the Commissioner in such action, the application shall be regarded as abandoned by the parties thereto, unless it be shown to the satisfaction of the Commissioner that such delay was unavoidable.

³ Therefore, by example, an unintentional delay in the reply might occur if the reply and transmittal form are to be prepared for shipment by the US Postal Service, but other pressing matters distract one's attention and the mail is not timely deposited for shipment.

As to Allegations of
Unintentional Delay

As indicated above, the requirements of a grantable petition pursuant to 37 C.F.R. §1.137(b) are the petition and fee therefor, a proper reply, a proper statement and/or showing of unintentional delay under the regulation, and, where applicable, a terminal disclaimer and fee.

As discussed above, it does not appear that Petitioner has satisfied the reply requirement under the rule as discussed above.

CONCLUSION

The instant petition under 37 C.F.R. §1.137(b) is **dismissed**.

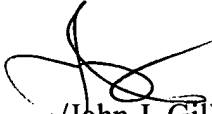
Further correspondence with respect to this matter should be addressed as follows:

By Mail: Mail Stop PETITION
 Commissioner for Patents
 P. O. Box 1450
 Alexandria, VA 22313-1450

By hand: U. S. Patent and Trademark Office
 Customer Service Window, Mail Stop Petitions
 Randolph Building
 401 Dulany Street
 Alexandria, VA 22314

The centralized facsimile number is **(571) 273-8300**.

Telephone inquiries regarding this decision may be directed to the undersigned at (571) 272-3214—it is noted, however, that all practice before the Office is in writing (see: 37 C.F.R. §1.2⁴) and the proper authority for action on any matter in this regard are the statutes (35 U.S.C.), regulations (37 C.F.R.) and the commentary on policy (MPEP). Therefore, no telephone discussion may be controlling or considered authority for Petitioner's action(s).



/John J. Gillon, Jr./
John J. Gillon, Jr.
Senior Attorney
Office of Petitions

⁴ The regulations at 37 C.F.R. §1.2 provide:

§1.2 Business to be transacted in writing.

All business with the Patent and Trademark Office should be transacted in writing. The personal attendance of applicants or their attorneys or agents at the Patent and Trademark Office is unnecessary. The action of the Patent and Trademark Office will be based exclusively on the written record in the Office. No attention will be paid to any alleged oral promise, stipulation, or understanding in relation to which there is disagreement or doubt.



UNITED STATES PATENT AND TRADEMARK OFFICE

UNITED STATES DEPARTMENT OF COMMERCE
United States Patent and Trademark Office
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www.uspto.gov

| APPLICATION NO. | FILING DATE | FIRST NAMED INVENTOR | ATTORNEY DOCKET NO. | CONFIRMATION NO. |
|-----------------|-------------|----------------------|---------------------|------------------|
| 10/733,944 | 12/12/2003 | Sten R. Gerfast | | 8717 |

7590 03/28/2006
STEN R. GERFAST
1802 VALLEY CURVE ROAD
MENDOTA HEIGHTS, MN 55118

EXAMINER

NGUYEN, TRAN N

ART UNIT PAPER NUMBER

2834

DATE MAILED: 03/28/2006

Please find below and/or attached an Office communication concerning this application or proceeding.

2/1

| | | | | |
|---|------------------------|--|---------------------|--|
| Notice of Non-Compliant Amendment (37 CFR 1.121) | Application No. | | Applicant(s) | |
| | 10/733,944 | | GERFAST, STEN R. | |
| | Examiner | | Art Unit | |
| | Tran N. Nguyen | | 2834 | |

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

The amendment document filed on 06 June 2005 is considered non-compliant because it has failed to meet the requirements of 37 CFR 1.121 or 1.4. In order for the amendment document to be compliant, correction of the following item(s) is required.

THE FOLLOWING MARKED (X) ITEM(S) CAUSE THE AMENDMENT DOCUMENT TO BE NON-COMPLIANT:

- ☐ 1. Amendments to the specification:
 - ☒ A. Amended paragraph(s) do not include markings.
 - ☐ B. New paragraph(s) should not be underlined.
 - ☒ C. Other clearly indicate newly added paragraph(s).
- ☐ 2. Abstract:
 - ☐ A. Not presented on a separate sheet. 37 CFR 1.72.
 - ☐ B. Other _____.
- ☐ 3. Amendments to the drawings:
 - ☒ A. The drawings are not properly identified in the top margin as "Replacement Sheet," "New Sheet," or "Annotated Sheet" as required by 37 CFR 1.121(d).
 - ☒ B. The practice of submitting proposed drawing correction has been eliminated. Replacement drawings showing amended figures, without markings, in compliance with 37 CFR 1.84 are required.
 - ☐ C. Other _____.
- ☐ 4. Amendments to the claims:
 - ☒ A. A complete listing of all of the claims is not present.
 - ☒ B. The listing of claims does not include the text of all pending claims (including withdrawn claims)
 - ☒ C. Each claim has not been provided with the proper status identifier, and as such, the individual status of each claim cannot be identified. Note: the status of every claim must be indicated after its claim number by using one of the following status identifiers: (Original), (Currently amended), (Canceled), (Previously presented), (New), (Not entered), (Withdrawn) and (Withdrawn-currently amended).
 - ☒ D. The claims of this amendment paper have not been presented in ascending numerical order.
 - ☒ E. Other: write your remarks, arguments separate sheets.
- ☐ 5. Other (e.g., the amendment is unsigned or not signed in accordance with 37 CFR 1.4):

For further explanation of the amendment format required by 37 CFR 1.121, see MPEP § 714.

TIME PERIODS FOR FILING A REPLY TO THIS NOTICE:

1. Applicant is given **no new time period** if the non-compliant amendment is an after-final amendment or an amendment filed after allowance. If applicant wishes to resubmit the non-compliant after-final amendment with corrections, the **entire corrected amendment** must be resubmitted.
2. Applicant is given **one month**, or thirty (30) days, whichever is longer, from the mail date of this notice to supply the correction, if the non-compliant amendment is one of the following: a preliminary amendment, a non-final amendment (including a submission for a request for continued examination (RCE) under 37 CFR 1.114), a supplemental amendment filed within a suspension period under 37 CFR 1.103(a) or (c), and an amendment filed in response to a Quayle action. If any of above boxes 1. to 4. are checked, the correction required is only the **corrected section** of the non-compliant amendment in compliance with 37 CFR 1.121.

Extensions of time are available under 37 CFR 1.136(a) only if the non-compliant amendment is a non-final amendment or an amendment filed in response to a Quayle action.

Failure to timely respond to this notice will result in:

Abandonment of the application if the non-compliant amendment is a non-final amendment or an amendment filed in response to a Quayle action; or

Non-entry of the amendment if the non-compliant amendment is a preliminary amendment or supplemental amendment.

Legal Instruments Examiner (LIE), if applicable

Telephone No.

DETAILED ACTION

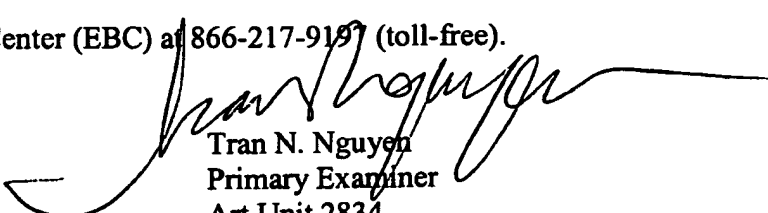
Response to Amendment

The reply filed on 6/6/05 is not fully responsive to the prior Office Action because of the following omission(s) or matter(s): The proper format of amendment for specification, claims, and remark (i.e. applicant argument). See 37 CFR 1.111. Since the above-mentioned reply appears to be *bona fide*, applicant is given **ONE (1) MONTH or THIRTY (30) DAYS** from the mailing date of this notice, whichever is longer, within which to supply the omission or correction in order to avoid abandonment. **EXTENSIONS OF THIS TIME PERIOD MAY BE GRANTED UNDER 37 CFR 1.136(a).**

Applicant is suggested to seek assistance from the USPTO Inventor Assistance 1-800-786-9199 or 571-272-1000, **asking for literature relating to Rules, Guidelines and Standard format of Amendment.**

Conclusion

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free).



Tran N. Nguyen
Primary Examiner
Art Unit 2834